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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. NUZZIO BEGAREN, Defendant and Appellant.	G050177 (Super. Ct. No. 12ZF0139) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

David P. Lampkin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Scott C. Taylor and Kimberley A. Donohue, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

This appeal from a murder conviction has many of the usual elements of a television detective drama: A cold case reopened more than a decade later; the pursuit of a family by a menacing dark sedan; the killing of a wife by a hit man after her husband took out a million-dollar life insurance policy on her; a car chase that closes down a freeway; and a detective who finally breaks the case after spotting a connection between the husband and one of the associates of the hit man.

But the legal issue is a little more prosaic and doesn't require recitation of all those facts. The link connecting the husband, defendant Nuzzio Begaren, to an associate of the hit man was a phone bill from 1998 showing a one–minute call from Begaren to an associate of the hit man three days after the murder. On appeal, Begaren argues AT&T's custodian of records was insufficiently qualified to authenticate the 1998 bill as a business record because he was not familiar with, as trial counsel put it, "how things worked with telephones back then." As we explain below, the AT&T custodian of records was able to identify the bill as the same kind of phone bill AT&T was producing at the time of trial, using computers to automatically record calls, and that was enough to pass the reasonability test for laying a business record foundation. Accordingly we affirm the husband's judgment of conviction and his 25 years to life sentence.

II. FACTS

On January 17, 1988, Elizabeth Wheat Begaren was murdered. Her husband, Nuzzio Begaren, was a suspect, especially because he provided conflicting stories of the murder, acted suspiciously, and was the beneficiary of a million-dollar life insurance policy on his wife of six months. But the police couldn't put together more than suspicion and the case went cold.

In 2011 the Anaheim Police Department cold case unit assigned the case to Detective Daron Wyatt, who gathered enough evidence to convict Begaren. A key to the case was a phone bill Begaren had tried to destroy. The foundation for that phone bill –

which connected Begaren to the hit man, a boyhood friend who had actually pulled the trigger at Begaren's behest – was laid by a clerk of records from AT&T.

Begaran's attorney objected to the testimony of the AT&T custodian of records, arguing there was no foundation he was "aware of how things were billed or how things worked with telephones back then." And when the court asked the custodian if he was "familiar with the procedures we used back in that time period," the custodian answered no. But then he added, looking at the bill, "based on how it looks, it's – not a whole lot has changed. It still shows the date and time where it was called from. It looks about the same as I am used to seeing."

The trial judge overruled the objection, reasoning the witness's not being familiar with "procedures" back in 1998 only went to the weight of his identification. The "foundation," declared the trial judge, was "sufficient." The prosecutor then went on to establish that the call connected Begaren to the admitted hit man.

The jury found Begaren guilty of murder and conspiracy to commit murder. It did not find him guilty of the special circumstance of committing murder for financial gain.[1] The court imposed a term of 25 years to life on the murder charge and imposed the same sentence for the conspiracy conviction but then stayed it. (See Pen. Code, § 654.) Begaren has appealed, confining his argument to the admission of the phone bill.

III. DISCUSSION

A. *Business Record Exception*

In California, the business records exception to the hearsay rule is codified in section 1271 of the Evidence Code.[2] The statute specifies the need for four elements to bring a writing within the exception.[3] Begaren challenges the presence of one of those

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[1] There is one obvious question that is not expressly dealt with in the briefing or the record: Did Begaren ever make a claim on the $1 million policy he took out on Elizabeth just after the marriage?

[2] All undesignated references to any statute are to the Evidence Code. All undesignated references to any subdivision of a statute are to section 1271 of that code.

[3] The statute is short, and provides in its entirety:

elements, namely that the custodian or other qualified witness "testifies to its identity and the mode of its preparation." Begaren asserts the prosecution laid an insufficient foundation for admission of the phone bill because they did not provide adequate evidence the custodian of records knew what the mode of preparation was.

The standard of review testing a trial court's ruling on whether a proper foundation has been laid for the business records exception is abuse of discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1011.) That is, we look to whether the decision was reasonable under the circumstances. (*People v. Dean* (2009) 174 Cal.App.4th 186, 193.)

Subdivision (d)'s element of testimony regarding identity and mode of preparation has been specifically held to be reviewed under a reasonableness standard. (See *Sierra Managed Asset Plan, LLC. v. Hale* (2015) 240 Cal.App.4th Supp. 1, 8, quoting *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 797, fn. 28 ["The trial court has wide discretion in determining whether a 'qualified witness' possesses sufficient personal knowledge of the '"identity and mode of preparation"' of documents for purposes of the business records exception."].) The reasonableness standard appears to be the federal rule as well. (See *United States v. Evans* (9th Cir. 2006) 178 Fed.Appx. 747, 750 [affirming trial court decision allowing local Verizon Wireless store manage to authenticate cellular phone bill and admit it under the business records exception]; *United States v. Wake* (5th Cir. 1991) 948 F.2d 1422, 1434-1435 [testing authentication under abuse of discretion standard].) We think the reasonableness standard particularly well suited to subdivision (d) authentication given the wide variety

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"Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (§ 1271.)

of businesses and the kinds of records they keep, as well as the circumstances under which they keep them.

Here, the trial court's determination that *this* custodian from AT&T had adequately testified to *this* phone bill's identity and mode of preparation was manifestly reasonable. It is important to recognize at this juncture that not all records generated by businesses are created equal. For example, handwritten purchase orders written by a chicken supplier (see *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 322 [upholding admission even though supplier did not witness "more than a few" of the transactions generating the orders]) are obviously more vulnerable to attack than machine-generated records (see *United States v. Lamons* (11th Cir. 2008) 532 F.3d 1251, 1263, fn. 23). And some business records don't qualify for exemption from the hearsay rule at all: Accident reports, for example, aren't generated in the usual course of a money-making business; they are typically generated for use in court. (See *Palmer v. Hoffman* (1943) 318 U.S. 109, 113-114.)

But in this regard, computer generated phone bills from large telecommunications companies fall on the gold standard side of the business record spectrum. For example, in *U.S. v. Guerena* (9th Cir. 1998) 142 F.3d 446 [1998 U.S.App. LEXIS 15548], the Ninth Circuit even upheld the authentication of cellular phone records from another country – the records were from "Baja Cellular" – even though the prosecutor was unable to authenticate the records through their custodian at Baja Cellular. The authentication was upheld because the prosecutor produced two American witnesses who "were able to testify that the records listed the dates, times, and numbers called in a pattern unique to cellular telephone bills and appeared authentic." (*Id.* at p. 8.) The court first noted that authentication can be accomplished through such things as internal patterns, contents, substance, appearance and other "'distinctive characteristics,

taken in conjunction with circumstances.'" (*Id*. at p. 8, quoting Fed.R.Evid. 901(b)(4).[4]) The two American witnesses were able to identify "enough of the appearance, content, and internal patterns of the phone bills to create a prima facie case of authenticity." (*Ibid.*)

Likewise, here AT&T's custodial witness was able to identify the distinctive formatting, appearance, content and internal patterns of AT&T's phone bills to authenticate the January 1998 phone bill. As far as the identity part of subdivision (d) is concerned, the custodian's testimony that the bill from 1998 looked like the bills AT&T is still preparing ("It looks about the same as I am used to seeing") passes a reasonableness test.[5]

As to the "mode of preparation" part of subdivision (d), Begaren emphasizes the custodian's admission that he was not familiar with the "procedures" used to prepare bills back in 1998. On this point, however, it is enough that he testified AT&T *automatically* records calls made using a calling card, which is another way of describing the obvious: Phone bills are computer-generated. They were computer-generated in 1998, they're computer-generated now. That was enough. Such phone records carry particular force because they are less subject to human manipulation than typical business

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[4] Federal Rule of Evidence 901 sets standards for meeting requirements of "authenticating or identifying an item of evidence." (See Fed.R.Evid. § 901(a).) The federal rule can provide guidance for California courts because it identifies various factors bearing on proper authentication. California's own section 1400, also governing authentication, is pretty general, simply asking for "the introduction of evidence sufficient to sustain a finding" that a writing is what the "proponent of the evidence claims it is" or (b) the "establishment of such facts by any other means provided by law."

[5] It is true that the custodian in *People v. Zavala* (2013) 216 Cal.App.4th 242 (*Zavala*) [also upholding admission of phone records], was more articulate about how Sprint uses a computer than our custodian was about how AT&T went about collecting its data in 1998 here. Here is the relevant passage from *Zavala*: "Trawicki [the custodian] stated he had worked for Sprint for eight and a half years as a custodian of records and was familiar with the way Sprint maintains its cell phone records, cell cite information, and text messaging records. Sprint uses a computer system that generates records of each phone call at the time it is made and then transmits the data to a call detail record archive. Trawicki testified that Sprint collects and maintains the call detail records of all its customers for billing purposes and keeps those records in the regular course of business." (*Id*. at pp. 244-245.) But if one examines this passage critically, one finds that, at the end of the day, the custodian in *Zavala* didn't say anything more than would be obvious to anyone: Sprint uses computers to make up its phone bills. The AT&T custodian here said the same thing, but in fewer words.

records. (See *United States v. Vela* (5th Cir. 1982) 673 F.2d 86, 90 [quoting district court's rationale for admitting phone records].)

Begaren's invocation of *Taggart v. Super Seer Corp.* (1995) 33 Cal.App.4th 1697 (*Taggart*) is unavailing because in that case there wasn't even an attempt to identify the records or their mode of preparation. *Taggart* was a personal injury case against a helmet maker. The plaintiff wanted to introduce reports of tests on a slightly earlier version of the helmet at issue from an independent research institute. (*Id.* at p. 1702.) The institute's custodian of records responded to a subpoena for the records, but the custodian's accompanying declaration failed to identify the records or their mode of preparation. In upholding a defense judgment against the plaintiff's claim that the trial judge should have admitted the reports, the appellate court noted that the subpoena requiring the production of the records (§ 1561) doesn't require the custodian to state the identity or mode of preparation of subpoenaed records, so the reports could not qualify as business records. (*Taggart, supra*, 33 Cal.App.4th at p. 1706.) The appellate court bulwarked its ruling by noting the different dynamics applying to business records obtained by subpoena and those authenticated in open court: "The Legislature's wisdom is demonstrated by what occurred in this case: not only did plaintiffs fail to show that the records were trustworthy, but Super Seer had no opportunity to show that the records were untrustworthy, or unreliable. Normally, where the proponent of evidence invokes the business records exception, the opponent can test the applicability of the exception by cross-examining the custodian of the records. Here, however, Super Seer had no opportunity to depose and cross-examine either the custodian or the Southwest employees who actually prepared the reports." (*Id.* at p. 1708.) By contrast, in the case at hand the AT&T custodian *was* available for cross-examination and if there were any grounds to doubt the authenticity of the phone bill they could readily have been exposed to the jury.

IV. DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.